



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Michael Cucciniello,
South Orange

CSC Docket No. 2021-84

Requests for Interim Relief

ISSUED: SEPTEMBER 7, 2020 (SLK)

Michael Cucciniello, a Police Sergeant with South Orange, represented by Michael A. Bukosky, Esq., petitions the Civil Service Commission (Commission) for interim relief regarding his pending disciplinary action.

By way of background, Cucciniello was served with a Preliminary Notice of Disciplinary Action (PNDA) on May 14, 2020, charging him with violating various administrative and departmental rules and regulations. The charges specified that on or about January 22, 2020, Cucciniello used excessive force when he struck a handcuffed arrestee in the head six times during the course of a robbery arrest. Additionally, the appointing authority indicated that he failed to document the incident on the Use of Force Report and in the incident report. Moreover, the appointing authority specified that he made false statements about the reports and the incident to the investigators. Additionally, on or about January 24, 2020, the appointing authority indicated that he falsely reported that he had been kicked in the groin and injured during the incident as he did not report this injury until after being suspended. Further, the appointing authority indicated that Cucciniello made various false and inconsistent statements to both Internal Affairs and the Essex County Prosecutor’s Office (Prosecutor’s Office). Accordingly, the appointing authority immediately suspended Cucciniello and sought his removal from employment.

In his request, Cucciniello presents that on May 14, 2020, his counsel requested a hearing and discovery in this matter. On May 19, 2020, the appointing authority responded that the hearing on the immediate suspension would be in writing. Thereafter, on May 21, 2020, Cucciniello responded arguing why this matter should not be a suspension without pay pending the disciplinary hearing. Subsequently, on June 3, 2020, the appointing authority replied indicating that the suspension without pay pending a departmental hearing would remain. Cucciniello files this request for interim relief as no departmental hearing has been set.¹

Cucciniello argues that he has a clear likelihood of success on the merits as the appointing authority has violated *N.J.S.A.* 40A:14-149 by failing to hold a departmental hearing within 30 days of charging a Police Officer. Specifically, the charges were served on May 14, 2020, and it failed to hold a departmental hearing by June 14, 2020. Therefore, he argues that since he immediately requested a departmental hearing upon service of the complaint, the charges must be dismissed as a matter of law. Additionally, Cucciniello argues that *N.J.A.C.* 4A:2-2.5 was violated by suspending him without pay prior to a departmental hearing as there has been no allegation that the safety, health, order or direction of public services has been compromised. He states that he acted in self-defense, no rules, regulations or codes were violated, and even if the charges were sustained, they would not constitute a “most serious crime.” Cucciniello presents that the detective who reviewed the video requested that none of the officers involved, including Cucciniello, be reprimanded and has not pressed for charges of excessive force. Additionally, the alleged victim indicated that he did not believe that the officers used excessive force. Further, the lay witnesses did not believe that excessive force was used. Therefore, he argues that there is no basis for an immediate suspension. Cucciniello cites *Herzog v. Township of Fairfield*, 349 *N.J. Super.* 602, 606 (2002), where even when the officer was ultimately terminated, the Court held that appellant could not be suspended without pay as this option is only reserved for the most serious charges. He highlights that the charges are not criminal in nature as the Prosecutor has cleared him of all crimes.

Cucciniello presents that the incident involved him arresting a suspect of a robbery who kicked him multiple times in the legs and testicles. He provided documentation to show that four trips to seek medical attention were necessary. Moreover, he claims that because he was suspended, he was not sure how to handle his workplace injuries and he was not able to report the injuries on the date of the incident, including supplementing various reports. Further, the Prosecutor found that there was insufficient credible evidence that he made an intentional misrepresentation of fact and found that the actions taken were in self-defense. Additionally, there is no issue regarding his mental fitness and no psychological report to evidence that he is unfit for duty.

¹ The appointing authority is now indicating that a departmental hearing was scheduled for August 20, 2020.

Cucciniello also argues that the appointing authority violated the “45-Day Rule” and *N.J.A.C. 4A:2-2.5(b)*. He presents that on February 28, 2020 the Prosecutor’s office found insufficient evidence to warrant a criminal prosecution. Therefore, pursuant to *N.J.S.A. 40A:14-147*, the 45-day period began on February 29, 2020, and the charges needed to be filed on April 14, 2020. However, in this matter, the charges were not served until May 14, 2020, which is well beyond the time required by the 45-Day Rule and the charges must be dismissed as a matter of law. Additionally, pursuant to *N.J.A.C. 4A:2-2.5(b)*, on May 14, 2020, he requested all the evidence that supported the charges; however, not a single document or piece of evidence has been presented. Further, the appointing authority did release a video to the newspaper which clearly shows that the charges were defective. Therefore, he argues that the suspension must be with pay as a matter of law. Also, Cucciniello argues that a statutory violation establishes irreparable harm. Additionally, he presents that he has a child that requires special treatments, which are extremely costly and is being paid with his health benefits through work. He asserts that if he is suspended without pay, he would face bankruptcy, foreclosure, and other irreparable harm, which cannot be solved at a later date because the loss of his current health benefit coverage would make it so that he could not seek medical treatments. Cucciniello also argues that no party will face substantial injury if he is returned to work as the evidence shows that there is no “victim” in this matter. Therefore, the public would be best served if he were reinstated or placed on suspension with pay as well as him receiving back pay. Additionally, it is in the public interest that the appointing authority abides by the statutes and does not cause him to unjustly lose his health care for his son.

In response, the appointing authority, represented by Arthur R. Thibault, Jr., Esq., states that Cucciniello’s appeal provides many inaccurate statements. For example, contrary to his assertion that it did not provide any evidence, it presents that on May 26, 2020, it provided 289 pages of documents, plus related audio and video files and a 25-page internal affairs investigation report regarding this incident, and on June 1, 2020, Cucciniello’s counsel confirmed receipt. Thereafter, settlement discussion took place, but an agreement could not be reached. It notes that per Cucciniello’s request, it did agree to maintain his health benefits during the suspension. It presents that between May 21, 2020 and May 29, 2020, it requested dates for a hearing, but Cucciniello did not respond. Thereafter, on June 3, 2020, the appointing authority responded to Cucciniello’s written opposition to an immediate suspension without pay by indicating that his suspension would continue. It presents that a hearing had not been scheduled due to the COVID-19 crisis, which is consistent with the Office of Administrative Law’s (OAL) suspension of all-in-person hearings.

The appointing authority argues that Cucciniello has not demonstrated a clear likelihood of success on the merits. Specifically, it did not violate *N.J.S.A. 40A:14-149* by failing to hold a hearing within 30 days of the charges as the law provides an exception as otherwise provided by law. The appointing authority asserts that the

present COVID-19 crisis and Statewide closures including administrative hearings is good cause. It also cites cases that where the Courts have shown flexibility for the 30-day requirement. The appointing authority further presents that on April 9, 2020, in response to the current health crisis, the Civil Service Commission (Commission) amended *N.J.A.C. 4A:2-2.5(d)* to indicate that a departmental hearing, if requested, shall be held within 30 days of the PNDA, which may be extended for good cause. Therefore, it argues that given that the Superior Court, other judicial forums, and the OAL suspended in-person hearings, there was good cause to not hold the hearing. Additionally, it notes that even if Cucciniello waived his right to a departmental hearing, an in-person hearing could not be held at the OAL. Moreover, Cucciniello has not responded to requests for in-person hearing dates.

The appointing authority also argues that Cucciniello was properly suspended without pay pursuant to *N.J.A.C. 4A:2-2.5* because of the nature of his falsification and untruthfulness rendered him unfit for duty and such immediate suspension was necessary to maintain safety, health, order of effective direction of public services by the police department. It presents that the evidence shows that he made statements unsupported by the record and these are factual issues that must be addressed at a hearing. Further, the appointing authority presents that Cucciniello was not immediately suspended under *N.J.S.A. 40A:14-149.1* as the Prosecutor chose not to charge him. However, it indicates that he was suspended without pay under *N.J.S.A. 11A:2-13* and *N.J.A.C. 4A:2-2.5* as he was found unfit for duty. The appointing authority indicates that it made this determination based on his use of excessive force by punching a handcuffed arrestee in the head six times and his falsification and untruthfulness in trying to cover-up and excuse his misconduct, which are clearly allegations that impact his ability to serve as a Police Officer.

The appointing authority states that it acted in full compliance with *N.J.S.A. 40A:14-147*. It notes that the 45-Day Rule only applies to violations of departmental rules and regulations and not administrative charges. Therefore, even if were determined to have violated the 45-Day Rule, the administrative charges would still not be dismissed. Additionally, the investigation was not complete until May 14, 2020, and therefore, it was in full compliance when it issued the PNDA on the same date. Moreover, the appointing authority argues that Cucciniello will not suffer irreparable harm if his request is denied as it has agreed to continue his health insurance and monetary damages, which can be cured with an order of back pay, are not irreparable harm. It cites a case where loss of health coverage during a suspension without pay even where a family member has an underlying medical condition requiring ongoing treatment is not considered irreparable harm. Finally, the appointing authority argues that it is in the public interest to continue his suspension without pay as he has been accused of excessive force and falsification, which undermines his ability to work as a Police Officer.

In reply, Cucciniello reiterates that the appointing authority violated *N.J.S.A.* 40A:14-149, *N.J.A.C.* 4A:2-2.5 and case law such as *In re Frey*, 160 *N.J. Super.* 140 (1978) and *Herzog, supra*, which mandate that he must be returned to work immediately. He also argues that the appointing authority violated *N.J.S.A.* 40A:14-147, which mandates that the charges must be dismissed. Cucciniello asserts that the appointing authority did not provide discovery until after its written submission, which greatly prejudiced his defense. Further, he states the appointing authority alleged excessive force, but when it realized that the arrestee admitted it was not excessive, witnesses stated it was not excessive, and the Prosecutor stated that it was self-defense, it sought falsification/reporting allegations, even though it took actions which prevented him from completing his report.

Cucciniello reiterates his argument that the charges must be dismissed due to the appointing authority's failure to commence a hearing within 30 days for a suspended officer. He states that although it requested a hearing on May 14, 2020, no hearing date has been set. Cucciniello asserts that it is the appointing authority's duty to set a hearing within the prescribed statutory time and now it is attempting to blame his counsel for its failure to do so. Additionally, Cucciniello states that he was forced to dangerously attend an investigation indoors during the pandemic and now it states that it cannot hold a hearing, even though Courts have continued to hold hearings. Also, the appointing authority was able to hold an immediate suspension hearing during the pandemic. He contends that the appointing authority did not have any regard for his safety by holding this dangerous hearing, and it cannot use the pandemic as both a shield and a sword. Cucciniello argues that in *Frey, supra*, the Court held that when an officer is suspended pending the hearing, the hearing must be commenced within 30 days and there are no timeline extensions. Therefore, since the hearing was not held before June 14, 2020, the charges must be dismissed.

Regarding the 45-Day Rule under *N.J.S.A.* 40A:14-147, Cucciniello notes that under *Herzog, supra*, the "45-day limit shall begin on the day after the disposition of the criminal investigation." In this matter, the Prosecutor's Office found insufficient evidence to warrant a criminal prosecution on February 28, 2020. He contends that the charges must have been filed on April 14, 2020, which was not done. Therefore, Cucciniello asserts that the immediate suspension charges are inappropriate and must be dismissed.

Cucciniello argues that the appointing authority failed to set forth an allegation supported by the evidence and that it would be a dangerous precedent of guilty before proven guilty. Regarding the untruthfulness and false reporting allegations, he states that he was not provided the time and opportunity to complete and/or supplement his report due to his immediate suspension. Further, although the appointing authority is claiming that he made false statements regarding his injuries from the incident, he provided medical documentation that says otherwise.

Additionally, although the Prosecutor's Office said that the appointing authority could commence an administrative review of the matter, it concluded that there was no credible evidence that the officer made an intentional misrepresentation of material fact and it found that his actions were in self-defense. Therefore, Cucciniello argues that it was frivolous to continue the investigation.

Cucciniello indicates that the evidence was not received prior to the immediate suspension. He presents that pursuant to *N.J.A.C.* 4A:2-2.5(b), he requested all the evidence in this matter on May 14, 2020. Cucciniello states that the appointing authority did not provide the evidence for his immediate suspension hearing. On May 19, 2020, the appointing authority stated that the immediate suspension hearing would be in writing. On May 21, 2020, he submitted his opposition to the immediate suspension without pay. Cucciniello acknowledges that he did receive discovery on May 26, 2020, which was five days after his submission was due. Therefore, he argues that the discovery submission was worthless since it was after the immediate suspension hearing. Additionally, Cucciniello cites a case from a Public Employment Relations Commission matter to support his position that to proceed to a plenary hearing in this matter would be damaging to the public as a waste of time and money where the statute provides that the matter should be dismissed as a matter of law.

In further reply, the appointing authority presents that it made multiple attempts to schedule the departmental hearing but Cucciniello's counsel did not reply. Therefore, it scheduled the departmental hearing on August 20, 2020. It also asserts that Cucciniello's counsel has been subpoenaing witnesses to appear at the hearing without notifying the appointing authority. Additionally, the appointing authority presents that *Herzog, supra*, involves a suspension on the basis of criminal charges under *N.J.S.A.* 40A:14-149.1 in a non-Civil Service jurisdiction and, therefore, is not applicable. Instead, it indicates that Cucciniello was suspended pursuant to *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5.

CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-1.2(c), the standards to be considered regarding a petition for interim relief are:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted;
and
4. The public interest.

N.J.S.A. 40A:14-147 provides that except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than

incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer. The complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or officer so charged, with notice of a designated hearing thereon by the proper authorities, which shall be not less than 10 nor more than 30 days from date of service of the complaint.

A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement of this paragraph for the filing of a complaint against an officer shall not apply to a filing of a complaint by a private individual.

A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

The law enforcement officer may waive the right to a hearing and may appeal the charges directly to any available authority specified by law or regulation, or follow any other procedure recognized by a contract, as permitted by law.

N.J.S.A. 40A:14-149 provides that if any member or officer of the police department or force shall be suspended pending a hearing as a result of charges made against him, such hearing, except as otherwise provided by law, shall be commenced within 30 days from the date of the service of the copy of the complaint upon him, in default of which the charges shall be dismissed and said member or officer may be returned to duty.

N.J.S.A. 11A:2-13, in conjunction with *N.J.A.C.* 4A:2-2.5(a)1 provide, in pertinent part, that an employee may be suspended immediately and prior to hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

N.J.A.C. 4A:2-2.5(b) provides where suspension is immediate under (a)1 and 2 above, and is without pay, the employee must be first apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charge and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority.

Initially, it is noted that the appellant's immediate suspension was appropriate. Cucciniello allegedly struck an arrestee six times in the head, and based on the appointing authority's view of the video evidence, it deemed such action as excessive force. Additionally, it alleged violations of internal and administrative rules concerning misreporting of the incident and false statements. Moreover, contrary to Cucciniello's statement that there was no evidence to support his suspension without pay because the alleged victim did not think excessive force was used, there were no witnesses who indicated that excessive force was used, and the Prosecutor did not go forward with criminal charges, the internal affairs report says the "victim" has little to no recollection as to what happened, it is unclear if any witness saw the striking of the arrestee's head, and the standard for administrative charges is lower than criminal charges. As such, these are allegations of an employee who is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. *See N.J.S.A.* 11A:2-13, in conjunction with *N.J.A.C.* 4A:2-2.5(a)1. Additionally, under *N.J.A.C.* 4A:2-2.5(b), the appointing authority had the authority to make the suspension without pay.

Concerning the merits of the case, the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. A critical issue in any disciplinary appeal is whether or not the petitioner's actions constituted wrongful conduct warranting discipline. The Commission will not attempt to determine such a disciplinary appeal on the written record without a full plenary hearing before an Administrative Law Judge who will hear live testimony, assess the credibility of witnesses, and weigh all the evidence in the record before making an initial decision. Likewise, the Commission cannot make a determination on whether Cucciniello's ultimate removal is appropriate without the benefit of a full hearing record before it. Since he has not conclusively demonstrated that he will succeed in having the underlying charges dismissed as there are material issues of fact present in the case, he has not shown a clear likelihood of success on the merits. Further, Cucciniello is not in danger of suffering immediate or irreparable harm or substantial injury if his request is not granted as he will be entitled to a departmental hearing and, subsequently, a hearing at the OAL, if necessary. Additionally, while the Commission is cognizant of his financial situation, the harm that he is suffering while awaiting his OAL hearing is financial in nature, and as such, can be remedied by the granting of back pay should he prevail in his appeal. Further, given that

Cuccineillo is a law enforcement officer who is held to a higher standard, and given that the charges are serious in nature, the public interest is best served by not having him on the job pending the outcome of his appeal to the Commission. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990).

Concerning the alleged procedural violations by the appointing authority, Cucciniello argues that under *N.J.S.A.* 40A:14-149, a hearing needed to be held within 30 days of the issuance of the charges on May 14, 2020. Therefore, he argues that since the departmental hearing was not held prior to June 14, 2020, that the matter needs to be dismissed as a matter of law. A review of the record indicates that there were initially settlement discussions and between May 21, 2020 and May 29, 2020, the appointing authority requested dates for a hearing. Cucciniello argues that it was the appointing authority's obligation to set a date for the hearing. However, the fact that the appointing authority attempted to set a mutual agreeable time for a hearing date and Cucciniello chose not to respond, any alleged procedural deficiencies are not grounds for the dismissal of his case.

Additionally, Cucciniello argues that the appointing authority cannot delay in setting the hearing date due to COVID-19, but force him to dangerously attend an investigation indoors during the pandemic. Initially, it is noted that appointing authority made its decision to continue the immediate suspension without pay based on the written record, which shows that it did have some concern about having in-person meetings. Regardless, Cucciniello equally cannot have it both ways where he complains that the in-person investigation was dangerous, but now complains that the appointing authority did not hold an in-person departmental hearing. He also cannot have it both ways where the appointing authority requested hearing dates, but he chose not to respond. It is also noted that pursuant to the Governor's Executive Order due to the COVID-19 emergency, the regulatory requirement to hold a departmental hearing within 30 days was relaxed. Additionally, *Frey, supra*, is distinguishable as that matter did not involve administrative charges and the delay in that matter was due to the appointing authority as the hearing officer and the complaining witness were unavailable. The delay in this matter was due to Cucciniello failing to respond to requests for a hearing date, and there was a health crisis which caused delays in having in-person hearings.

Regarding the alleged violations of the 45-Day Rule under *N.J.S.A.* 40A:14-147, the 45-day time limitation contained in *N.J.S.A.* 40A:14-147 only expressly applies to charges related to violations of departmental rules and regulations. *See e.g., Hendricks v. Venettone*, Docket No. A-1245-91T5 (App. Div. October 29, 1992); *In the Matter of Bruce McGarvey v. Township of Moorestown*, Docket No. A-684-98T1 (App. Div. June 22, 2000). *See e.g., McElwee V. Borough of Fieldsboro*, 400 *N.J. Super.* 388 (App. Div. 2008). *See also, In the Matter of Christopher Mercardo* (CSC, decided April 18, 2012); *In the Matter of Claudy Augustin* (MSB, decided April 23, 2008). *See*

also, *In the Matter of James Cassidy* (MSB, decided August 12, 2003); *In the Matter of Steven Palamara* (MSB, decided April 10, 2002). As such, *Herzog, supra*, which only involved departmental charges, and not administrative charges as in this case, is not applicable. Regardless, appointing authorities are permitted a reasonable time to commence an investigation after a matter is returned to it from a Prosecutor. In this case, the appointing authority indicated that it concluded its investigation on May 14, 2020 and charged Cucciniello the same day.

Referencing the alleged violation of *N.J.A.C. 4A:2-2.5(b)* for the appointing authority's failure to provide evidence in a timely manner, the record indicates that the appointing authority indicates that Cucciniello's response to its opposition to his suspension without pay was due on May 21, 2020. In his response on that date, Cucciniello submits his arguments and complains he has not been provided evidence. Thereafter, on May 26, 2020, the appointing authority sent Cucciniello evidence, and the receipt of such evidence was acknowledged on June 1, 2020. Cucciniello is now arguing that the evidence was worthless as it was received after he submitted its May 21, 2020 opposition to the suspension without pay. However, it is noted that Cucciniello's counsel did not indicate in its receipt of the evidence that it was requesting additional time to review the evidence so that it could submit a supplemental response to its opposition. Thereafter, on June 3, 2020, the appointing authority issued its determination that the suspension without pay would remain until a departmental hearing. As such, the Commission finds that the appointing authority complied with *N.J.A.C. 4A:2-2.5(b)*, and, as indicated above, clearly finds that the standards for an immediate suspension have been met.

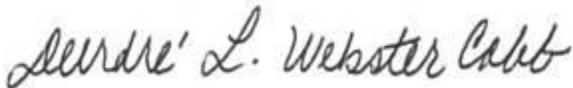
Accordingly, the Cucciniello has failed to show that he is entitled to interim relief.

ORDER

Therefore, it is ordered that this petition be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF SEPTEMBER 2020



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